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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WILLIAM HERNANDEZ et al.,
Plaintiffs and Appellants,
v.
PETER MAGOWAN et al.,
Defendants and Respondents.

A104204

(San Francisco County Super. Ct. No. CGC-02-408038)

Plaintiffs/appellants William Hernandez and his wife, Rosa Hernandez, appeal a summary judgment in favor of defendants/respondents Peter Magowan and his wife, Deborah Magowan, in the Hernandezes' action for wrongful employment termination. They contend triable issues of material fact exist regarding termination in violation of public policy and breach of implied contract and the implied covenant of good faith and fair dealing.

BACKGROUND

Hernandezes' Employment

In 1986 the Magowans hired Rosa Hernandez to perform housekeeping duties (cooking, cleaning, laundry, grocery shopping, etc.) for them. In 1987 they hired William Hernandez to perform gardening, maintenance, and other errands for them. The Hernandezes were not employed for a specific term at the time of their hiring.

House Loan

Several years later, the Hernandezes told the Magowans they would like to buy a house. However, to buy a house they could afford they would have to leave the area and seek employment elsewhere. In 1991 the Magowans agreed to lend the Hernandezes money toward the purchase of a house. A document memorializing the arrangement, handwritten by Peter Magowan but not signed by any of the parties, is entitled "For Rosa & William," and states, inter alia:

"In return for your agreement to stay working for us the next 15 years at essentially today's salary [we] will do the following for you [:]

1. Give you $20,000 now--all of this to be applied to the purchase of your house [.]

2. Loan you all the money that you will need that you cannot get from the bank [].

3. We will loan you this amount that you need (say $120,000) at the lowest permissible interest rate--probably 8%. So long as you stay employed with us our intention would be to forgive the interest each year and a part of the principal up to a total of $10,000 each year. So if we start off with a loan of 120,000[,] then at the end of year one the remaining loan would be 110,000, etc. In effect we will be making a gift to you over the next 15 years of the entire loan plus the 20,000 we are giving you today [i]f you stay satisfactorily employed.

However, if for any reason either one of you decides to leave our employment or we decide that you should leave our employment[,] then you would be obligated to pay us the remaining amount of your loan. If you could not do so we would have the right to demand that your house be sold so that your remaining obligation to us on your loan would be paid.

[]

Over time we would expect to give you normal increases in the length of vacation, etc. but not more money. If everything works out ok between us there may be other ways that we can find to help you with costs that do not result in an increase in pay--for example after a certain number of years we may be able to help you with some of the

schooling expense. You should realize that [we] are making a major commitment. We are

1) Giving you 20,000

2) "loaning" you another 110,000-120,000 -- We have to come up with this money and we are forgoing the income we could earn on this money. This "loan" will, over time, turn into a gift--so we are essentially making you a gift of 20,000 plus another 110,000-120,000

3) Probably paying taxes on the interest payments that you won't be making to us.

I hope you understand that we are making this commitment with the expectation that both of you will continue to be worthy of it--to be dependable, loyal, honest, hardworking & friendly."

On March 6, 1991, the Hernandezes executed a promissory note of $130,000 to the Magowans, secured by a deed of trust to the house the Hernandezes had purchased.

February 2000 Agreement

In February 2000 the Hernandezes were having financial problems and met with Peter Magowan to discuss a salary increase, as well as other employment difficulties. Peter Magowan prepared a written outline for their discussion and kept notes of their meeting.

According to these notes, the Hernandezes complained that Aimee (another employee of the Magowans) earned more money than they did, opened the refrigerator, sat on the couch and did not clean up after herself. They also complained that Deborah Magowan never offered them a day off and looked at her watch whenever they asked to leave early. Peter Magowan told them they would have to discuss these matters with Deborah Magowan.

Peter Magowan's notes show a proposal to increase the Hernandezes' joint salary from $52,000 to $70,000 per year, a 34.6 percent annual increase. He testified at his deposition that he thought, but was not sure, he proposed this amount. His outline also itemized the other kinds of compensation they were receiving: medical benefits, school

tuition for their two younger sons, Franklin and Jorge,[1] forgiveness on the principal and interest of their house loan, baseball tickets and other gifts, and reduction in working hours with no reduction in salary.

In exchange for providing financial help, Peter Magowan explained to the Hernandezes that he expected them to operate their own household in a more financially responsible manner by following several specified acts he discussed with them. He gave them a copy of his outline and notes, including the specific acts. They included (1) using the salary increase to repay their debts; (2) the Magowans' review of their outstanding debts every three months and their obligation to see a financial advisor if the debts were not reduced; (3) no pay increases for at least four years, when Jorge, the youngest son, would have graduated from high school; (4) Franklin and Jorge obtaining summer jobs; (5) avoiding trips to El Salvador until the debt disappeared and being careful with expenses at Christmas, vacations, and reunions with their oldest son, William Junior, and (6) seeing Franklin and Jorge's report cards because Peter Magowan had arranged their admission to their private high school.

According to Rosa Hernandez's declaration, the Hernandezes, not Peter Magowan, proposed the salary increase to $70,000 at their meeting. She further declared that instead he offered to pay $40,000 toward their outstanding debts, and that they agreed to this offer, as well as his conditions, enumerated *ante*.

Termination

On October 15, 2001, Rosa Hernandez went grocery shopping for the Magowans, using a check from Deborah Magowan to pay for the groceries. According to their usual practice she gave the sales receipt to Deborah Magowan. When Deborah Magowan reviewed the receipt, she noticed that Rosa Hernandez bought several items she had not been instructed to purchase and that were not for use in the Magowan household: strawberries, bagels, orange juice and milk. The value of these items was $17.00. Deborah Magowan asked Rosa Hernandez several times about the items. Rosa

[1] The Hernandezes' oldest son, William Junior, was apparently an adult and living on his own at this time.

Hernandez replied, "it must be a mistake by" the store, and she returned to the store to discuss the mistake.

While Rosa Hernandez was at the store, Deborah Magowan telephoned the store manager, who informed her the mistake could not have happened as Rosa Hernandez had described it to her. The store manager's information made her suspicious that Rosa Hernandez had lied to her.

According to Rosa Hernandez's declaration and deposition testimony, she and William Hernandez helped care for an ailing neighbor by occasionally shopping for her when they shopped for the Magowans. They told the Magowans they performed this task. On October 15, 2001, the neighbor's caregiver telephoned Rosa Hernandez on her cell phone and asked her to buy the above-itemized groceries for the neighbor. When Rosa Hernandez returned from the grocery store and was asked several times about the discrepancy in the receipt, she did not tell Deborah Magowan that she had purchased the groceries for the neighbor by including the cost of the groceries in the Magowan check.[2] Rather she told her it must be a mistake by the grocery store. Once she returned to the store to inquire about the discrepancy, she realized it was not the store's mistake. Instead, she had erroneously combined the groceries for the Magowans with the groceries for the Hernandezes' neighbor.

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[2] There is a conflict between Rosa Hernandez's October 31, 2002 deposition testimony and her August 1, 2003 declaration in opposition to the Magowans' motion for summary judgment. At her deposition she testified that when Deborah Magowan discovered the discrepancy between the groceries purchased for the Magowan household and the groceries itemized on the receipt, she did not tell Deborah Magowan that she had purchased groceries for the neighbor, and that she did not remember until she got to the store to inquire about the store's mistake that in fact she had purchased these items for the neighbor.

In her declaration she stated that when Deborah Magowan told her there was a difference between the grocery items in the Magowan kitchen and those listed on the receipt, she told Deborah Magowan that the grocery checker had mistakenly combined the items for the neighbor with the items for the Magowan household. Admissions or concessions made during discovery govern and control over contrary declarations subsequently offered to oppose a motion for summary judgment, and such contrary statements, absent an explanation, are disregarded. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860.)

The following day Rosa Hernandez explained her mistake to Peter Magowan. He told her not to worry, that he understood she had been in a hurry, and to "go upstairs" and apologize to Deborah Magowan and repay the $17.00. Rosa Hernandez then went to Deborah Magowan's upstairs home office, told her the groceries were for a neighbor, apologized, and gave her a 20 dollar bill. According to Rosa Hernandez's deposition testimony, Deborah Magowan accepted the bill, gave her $3.00 change, and told her she could no longer work for the Magowans because "I don't trust you."[3] Rosa Hernandez protested that termination over a $17.00 mistake was unfair, but Deborah Magowan asked her to leave and refused to give her a recommendation. Rosa Hernandez then asked what would happen to William Hernandez, and Deborah Magowan replied, "He can go, too." According to Deborah Magowan's declaration, she terminated Rosa Hernandez because she had purchased groceries with the Magowans' money that were not for the Magowan household and had lied to Deborah Magowan about the purchase, and Deborah Magowan felt she could no longer trust her. She considered Rosa Hernandez's offer of the 20 dollar bill an attempt to get back in her good graces and pay her debt.

Although it is disputed whether William Hernandez left the Magowans' employ voluntarily or was directly or indirectly fired, it is undisputed that he never returned to work for them after Rosa Hernandez's October 2001 termination.

According to Deborah Magowan's deposition, William Hernandez came to her home office about an hour and a half after she had terminated Rosa Hernandez. He asked "what was going on." When she asked if he had talked to Rosa Hernandez, he said, "no," and Deborah Magowan replied, "Well, I think you should talk to Rosa." William Hernandez then said, "Rosa has apologized to Mr. Magowan already," to which Deborah Magowan replied, "Well, then you do know. So you were lying. You told me you didn't

[3] Rosa Hernandez's declaration varies slightly from her deposition as to the language of her termination. She declared that after Deborah Magowan gave her $3.00 change, "I said 'everyone makes mistakes' and Mrs. Magowan said 'everyone makes mistakes and sometimes they have to pay for them.' I knew from her voice that I was being fired."

know what happened." He repeatedly replied that lying and stealing "was no big deal." Deborah Magowan explained it was a very serious business with the Magowans.

Deborah Magowan further testified that William Hernandez replied that he would not leave without speaking to Peter Magowan, and that he wanted a letter of termination. Deborah Magowan then telephoned Peter Magowan's administrative assistant, Shirley Casabat, who said Peter Magowan was in a meeting and unavailable, that she had never heard of a letter of termination, and that she would check into it. Deborah Magowan told Casabat that William Hernandez thought she and Casabat were lying to him. Deborah Magowan asked Casabat to repeat to Hernandez what Casabat had just told Deborah Magowan, and handed him the telephone receiver. Instead of accepting the receiver he backed up into the room and began yelling, "'Shirley, Shirley, don't believe anything Mrs. Magowan is saying. She's a liar, she's a horrible person.'" Casabat hung up and, very upset, telephoned some friends of the Magowans and asked them to go to the Magowan house because William Hernandez was screaming at Deborah Magowan. Deborah Magowan learned about Casabat's telephone call when the friends arrived at her house.

Deborah Magowan testified that she would not have fired William Hernandez up to that point, nor did she think he had really resigned. She would have fired him after his outburst.

William Hernandez testified that when he went to Deborah Magowan's office and asked what was going to happen to him, she replied that he "can leave, too." He then "just went downstairs and we went home." The following day he returned to the Magowans' house. His key no longer worked in the lock.

In November 2001 the Magowans hired Carlos Castillo, who had worked for Peter Magowan's mother for 11 years, to replace William Hernandez. He was over 40 years old at the time. In approximately December 2002 the Magowans hired Ana Canas to fill Rosa Hernandez's position. During the 14 months between Rosa Hernandez's termination and Ana Canas's hiring, Deborah Magowan had "tried out" two other women

in the position. One of these women was named Ingrid, but she could not recall the other woman's name. Castillo and Canas are both Hispanic.

Proceedings Below

a. DFEH Claim

On April 6, 2002, the Hernandezes filed claims with the California Department of Fair Employment and Housing (DFEH) against Peter Magowan only. They each claimed they had been terminated because of their Latino American race and Hispanic ethnicity. William Hernandez also claimed age discrimination. The DFEH denied their claims and issued them "right to sue" letters.

b. Complaint

On May 17, 2002, the Hernandezes filed the instant complaint. They alleged generally that the Magowans' stated reason for their termination--spending $17.00 of the Magowans' money to buy groceries for nonhousehold purposes--was pretextual because the Magowans wanted to use a Caucasian worker to perform a portion of the Hernandezes' work; that in 1999 the Magowans hired a Caucasian worker whom the Hernandezes were asked to train; that after this Caucasian worker was hired and trained, they were subjected to repeated harassment by this worker and the Magowans; that the Magowans hired two additional Caucasian workers in 2000 to take over some of the Hernandezes' job responsibilities and each of these employees was treated "far better" than the Hernandezes.

The Hernandezes' first cause of action was for wrongful discharge based on their age and Hispanic-American ancestry, in violation of the constitutional and statutory proscriptions against employment termination based on race. Their second cause of action was for breach of an implied contract not to be discharged except for good cause. They alleged their 15 years of employment, positive performance evaluations, repeated assurances that they would not be arbitrarily discharged, and the 1991 loan agreement constituted the implied contract. Although they did not specifically allege the Magowans lacked good cause to terminate them, they impliedly did so by their general allegation that their termination was pretextual.

The complaint also contained causes of action for intentional infliction of emotional distress, and for a preliminary injunction enjoining the Magowans from foreclosing on the lien against their house.[4]

c. Summary Judgment

The Magowans moved for summary judgment on the grounds (1) they had legitimate, nondiscriminatory reasons for discharging Rosa Hernandez; (2) William Hernandez resigned voluntarily; and (3) even if they discharged him, he could not show the reason was due to his race or age. Their motion was granted and this appeal follows.

DISCUSSION

I. *Standard of Review*

Motions for summary judgment are properly granted if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of each of the plaintiff's causes of action cannot be established or establish a complete defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) Once the defendant makes such a prima facie showing, the burden shifts to the plaintiff to show that a triable issue of material fact exits within the framework of the issues as fixed by the pleading. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122.)

Summary judgments are reviewed de novo, pursuant to the same statutory procedure followed in the trial court. (*Lowe, supra*, 56 Cal.App.4th at p. 121; *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 629.)

II. *Employment Discrimination Actions*

California has established a three-step burden-shifting test for trying claims of employment discrimination based on a theory of disparate treatment. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 352, 354 (*Guz*).) Plaintiffs must first establish a prima

[4] On April 17, 2002, Peter Magowan had notified the Hernandezes that they were in default on their home loan, which had a remaining balance of $30,000, for failing to pay the interest of $2,700 that was due March 12, 2002.

facie case of discrimination. (*Ibid*.) They must show, at least, some action taken by their employer from which a person could infer, absent any explanation, that it is more likely than not that the action was based on a prohibited discriminatory criterion. (*Id*. at p. 355.) Generally, plaintiffs must provide evidence of (1) membership in a protected class, (2) competent performance of the position they occupied, (3) an adverse employment action, such as termination, and (4) some circumstance suggesting a discriminatory motive for the adverse action. (*Ibid*.)

Once the plaintiffs make a prima facie case, the burden shifts to the defendant to produce evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Guz*, *supra*, 24 Cal.4th at pp. 355, 356.) If the defendant sustains this burden, the plaintiffs must then offer evidence that the defendant's proffered reason was pretextual or other evidence of discriminatory motive. (*Ibid*.)

A court need not first determine whether the plaintiffs met their prima facie burden if the defendant's summary judgment motion proceeds directly to its burden of presenting competent, admissible evidence that its action was taken for a nondiscriminatory reason. (*Guz, supra*, 24 Cal.4th at p. 357.) In this case the Magowans' motion provided a facially credible explanation of their nondiscriminatory reasons for the terminations. No citation is necessary to the voluminous legal authority that a person's home has traditionally been treated as place of security and privilege. Thus, a person who works regularly in another person's home occupies a particular position of trust with his or her employer by being privy to details of the employer's personal life and having access to the employer's personal possessions. The Magowans could reasonably perceive Rosa Hernandez as having violated that position not only because she misappropriated the Magowans' money entrusted to her but also because she initially sought to lay the blame for the misappropriation elsewhere. The Magowans could also perceive that William Hernandez, although he did not participate in these acts, was untrustworthy because he characterized them as inconsequential ("stealing and lying was no big deal"). Furthermore, his accusatory and disruptive behavior in Deborah Magowan's home office

would have been a legitimate reason to dismiss him, even if Deborah Magowan had not considered him terminated prior to that behavior.

The question is whether the Hernandezes rebutted the Magowans' facially dispositive showing with evidence that raises a rational inference their terminations were motivated by intentional discrimination. (*Guz, supra*, 24 Cal.4th at p. 357.)

a. Age Discrimination

William Hernandez, who was 52 years old when he left the Mogowans' employ, testified that he never heard or heard about any comment by Peter or Deborah Magowan regarding his age, Rosa Hernandez's age, or age in general. The only evidence relating to age was offered via the deposition testimony of Rosa Hernandez. Asked if she ever heard Peter Magowan make any statements regarding William Hernandez's age, she replied: "[T]hey both one day told me that William keeps forgetting things, that he hasn't done things properly, because he was getting older, and he keeps forgetting things that they asked to do for them." Asked if she ever heard Deborah Magowan make any age-related statements about William Hernandez, she replied: "Maybe twice . . . [Deborah Magowan said] [t]hat William, sometimes he looks stupid and he looks [dumb], and he keeps forgetting things. . . ." Rosa Hernandez did not remember the first time Deborah Magowan made such a statement.

To avoid summary judgment, "an employee claiming discrimination must offer *substantial evidence* that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*), italics added.) Rosa Hernandez's testimony does not constitute the requisite substantial evidence. There is no evidence of age bias toward her. To infer age bias as a basis for William Hernandez's termination from the Magowans' one remark about his "getting older" and three (at most) comments about his "forgetting things" is, without more details, a strained inference, particularly when the man hired to replace William Hernandez was over 40 years old,

and Rosa Hernandez herself acknowledged noticing that William Hernandez "forgets things."

b. Race/National Origin/Color Discrimination

The Hernandezes did not present any evidence of specific conduct by Peter Magowan that suggested race/national origin discrimination. William Hernandez testified that he did not remember ever personally hearing Peter Magowan make any statements about his or Rosa Hernandez's race or color or any statements concerning Latinos, nor did he remember hearing from a third party that Peter Magowan had done so. He did not remember Peter Magowan ever doing or saying anything he considered inappropriate in his presence, nor did he ever hear from Rosa Hernandez or any other source of any inappropriate act or statement by Peter Magowan. Rosa Hernandez testified that she never heard Peter (or Deborah) Magowan make any statements about her or William Hernandez's race.

As evidence of racial/color bias as a factor in their terminations, William Hernandez stated that Deborah Magowan "commented that she didn't like Latins." The comment to which he referred was made "four years ago" (i.e, 1998) and concerned his facial hair.[5] Asked if he ever "actually heard Mrs. Magowan complaining that you were

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[5] The following colloquy occurred during William Hernandez's deposition:

Magowans' attorney: "[D]id you ever hear Mr. Magowan or Mrs. Magowan make any statements concerning your race or color?

William Hernandez. "Yes. The lady commented that she didn't like Latins.

"Q. And when did she say that?

"A: Four years ago. [The deposition date was October 31, 2002.]

"Q: And where was that statement made?

"A. Sometimes--every time that I would show up in the morning--

"Interpreter Stoddard: The interpreter would like to ask for a repetition from the witness, please.

Magowans' attorney: "That's fine.

William Hernandez: "She would look at my face to see if I had shaved . . . because she didn't like a Latin that had facial hair, beards on their faces.

"Q: And what exact words did she use when she said that to you?

"A: That the Latins and the Mexicans look ugly when they wear beards and mustaches, and I kept telling her that I wasn't Mexican, that I was San Salvadorian.

"Q. Was anyone else present at any time that [] such a statement was made?

Latinos," he replied that her comments to him were both "serious" and "joking around." When he was asked for examples of such comments he replied, "Sometimes she would call it to my attention that I was speaking Spanish. The shock for me was when Alexander [the Magowans' young grandson] was at home. Mr., never Mrs., but Mr. [had] asked me to speak Spanish" to the boy, giving William Hernandez the impression that Peter Magowan wanted the boy to learn Spanish.

As further evidence of racial/color bias, William Hernandez stated that the Magowans hired two Caucasians, Aimee and Sonya, in 1999, who "worked fewer hours, but were paid more money," and during the last two years of the Hernandezes' employment, Deborah Magowan treated them more favorably than she treated the Hernandezes. As examples of preferential treatment, he stated that Aimee could drink wine during working hours, eat food in the Magowan house, and take days off whenever she wanted to. By contrast, Deborah Magowan instructed the Hernandezes that they were not to take food from the Magowan house or permitted to eat in it. William Hernandez also stated that after Aimee was hired, Deborah Magowan always looked at him in an "ugly" and "sarcastic" way as if to say she did not like Latins.

Rosa Hernandez stated that in 2000 she and Deborah Magowan argued over her request for a raise. During the argument Deborah Magowan referred to "everything she had done [for the Hernandezes] in the past" and suggested they were overspending. Although the Hernandezes were given a raise, Deborah Magowan was not thereafter as friendly as she had been and talked less often to Rosa Hernandez. When Rosa Hernandez once asked the reason for her changed attitude, Deborah Magowan replied "she had too many problems with" her.

"A: Just she and myself.

. . . . . .

"Q: When Mrs. Magowan made this remark four years ago that you claim occurred concerning facial hair, what did you say?

[]

"A: That I shaved every day [] that my face was always clean."

Rosa Hernandez further stated that she once told Aimee that she and William Hernandez were not happy working for the Magowans and felt discriminated against, and "Aimee on many occasions told me that she didn't like the way Mrs. Magowan treat[ed] us, and she thought because it was our race." Rosa Hernandez responded to Aimee that she had "noticed the same thing."

Rosa Hernandez also stated that the Magowans were aware of the Hernandezes' feeling of discrimination. After a trip to Hawaii, accompanied by Aimee, the Magowans met with the Herndandezes and informed them that during the trip, Aimee told them about her conversation with Rosa Hernandez concerning discrimination. At this meeting with the Magowans, Rosa Hernandez confirmed that Aimee had suggested to her that the Hernandezes leave the Magowans' employ because they did not "deserve to be treated like that," and that Aimee had told her that "she [Aimee] understood why Mrs. Magowan behaved" as she did. Additionally, at some time in 2000 or 2001, Rosa Hernandez told Deborah Magowan that she was discriminating against the Hernandezes by the way she treated them. Deborah Magowan replied "that she wasn't discriminating us. She said that the way we [Hernandezes] look at it made us think that she was discriminating."

The Hernandezes declared that after the 2000 discussion and agreement regarding their salary increase, Deborah Magowan became increasingly critical of them, began calling William Hernandez "dummy," and repeatedly stated she did not like Latins. She also directed them to follow orders from and do work for Aimee, and she required Rosa Hernandez to cook and do other chores for the Magowans' country house, which was Sonya's job.

The Hernandezes' evidence does not reasonably imply that their terminations were provoked by the Magowans' discriminatory race or national origin animus. First, the single specific reference to people of Hispanic heritage--Deborah Magowan's comment about facial hair on Latin men--was made four years before the termination. This time lag makes this incident too attenuated to demonstrate an illegal discriminatory basis for his termination.

Second, issues of fact can be created only by a conflict of evidence, not by speculation or conjecture. (*Horn v. Cushman & Wakefield Western, Inc*. (1999) 72 Cal.App.4th 798, 807 (*Horn*).) The Hernandezes made general assertions that the Caucasian employees, Aimee and Sonya, received a higher pay and Aimee received more favorable treatment, but they offered no specific evidence of disparate treatment based on race or national origin. For example, there was no evidence that these two women and the Hernandezes were performing substantially comparable tasks or had comparable experience, or that, when the Hernandezes' "total package," e.g., salary, school tuition, home loan forgiveness, was taken into account, their salary was still less than the salary of these women.

The Hernandezes' evidence may reflect a deteriorating employer/employee relationship with the Magowans in the final two years of the Hernandezes' employment. However, their vague references to their and Aimee's perceived discriminatory treatment by the Magowans during these two years consist of suspicions, conjecture, and speculation lacking any foundation, e.g., Deborah Magowan "looked at" William Hernandez in an "ugly" and "sarcastic" way; Rosa Hernandez "felt" discriminated against; Aimee "did not like" Deborah Magowan's treatment of the Hernandezes and "thought" Deborah Magowan's ill treatment was because of the Hernandezes' race. Such references are too conclusory and inchoate to constitute the requisite "'substantial responsive evidence'" (*Hersant, supra*, 57 Cal.App.4th at p. 1009) to demonstrate that the Magowans' proffered explanation for termination veiled a termination based on a race/national origin/color bias, especially given the fact the Hernandezes' successor employees were also of Latin American heritage. Consequently, the Hernandezes' evidence does not suffice to raise a triable issue of fact to withstand summary judgment. (*Horn, supra*, 72 Cal.App.4th at p. 807.)

III. *Implied Contract Claim*

The Hernandezes contend there are triable issues of fact that they were employed pursuant to an implied contract that permitted termination only for cause, and that the Magowans lacked good cause to terminate.

There is a statutory presumption that an employment without a specified term may be terminated at will. (Lab. Code, § 2922; *Guz, supra*, 24 Cal.4th at p. 335.) This presumption is rebutted by evidence of an express or implied agreement that the employee will be terminated only for good cause. (*Id*. at p. 336.) We need not reach the question of whether there was a triable issue of fact concerning the existence of such an implied contract because we conclude the Magowans had good cause as a matter of law to terminate the Hernandezes' employment.

In the context of implied employment contracts, "good" or "just" cause connotes a fair and honest reason, regulated by good faith on the part of the employer, that is not trivial, capricious, unrelated to business needs or goals, or pretextual, and that is supported by substantial evidence gathered through adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond. (*Cotran v. Rollins Hudig Hall Internat., Inc*. (1998) 17 Cal.4th 93, 107-108 (*Cotran*).) When good cause is a factual question, a jury is to determine whether the employer, acting in good faith and following an appropriate investigation when it decided to terminate the employee, had reasonable grounds for believing the employee committed the misconduct that resulted in the termination. (*Id*. at pp. 108-109.) However, when the facts are undisputed or admit of only one conclusion, the existence or absence of good cause may be determined on a motion for summary judgment. (*Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 841; *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 264.)

Here, the acts for which Rosa Hernandez was terminated are undisputed. Rosa Hernandez used the Magowans' money to pay for someone else's groceries and, when questioned about this several times, she provided an explanation that was refuted by the grocery store. These undisputed facts establish as a matter of law that Deborah Magowan had grounds to believe, in good faith, that her in-home employee was dishonest.[6] "The proper inquiry . . . is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is, 'Was the factual basis on which an employer concluded a dischargeable act had

[6] We do not decide whether Rosa Hernandez was in fact dishonest.

been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?'" (*Cotran, supra*, 17 Cal.4th at p. 107.)

The Hernandezes do not challenge that misuse of an employer's money and dishonesty in attempting to conceal or explain away the misuse, constitute, in principle, good cause for termination. The crux of their argument, as we understand it, is that termination based on misuse of such a de minimus amount--$17.00--raises a triable issue of fact that the reason for the termination was trivial or pretextual and thus not for good cause, particularly given their longtime employment with the Magowans and no prior misconduct in the purchase of groceries.

Good cause is a relative term; whether it exists depends on the particular circumstances of each case. (*Cotran, supra*, 17 Cal.4th at p. 100.) The decision calls for a balance between the employer's interest in operating his or her business efficiently and the employee's interest in continued employment. (*Ibid*.) However, courts must take care not to interfere with the employer's legitimate exercise of managerial discretion, and when the employee occupies a sensitive or confidential position, the employer must necessarily be allowed substantial scope for the exercise of subjective judgment. (*Ibid*.)

By any standard an employee's dishonesty or the concealment of an unauthorized use of an employer's personal property that has been entrusted to the employee, regardless of the property's value, and the employee's subsequent attempt to deny responsibility for a misuse, is unacceptable conduct. It manifests disloyalty to the employer and a betrayal of the employer's trust. "'There is no more elemental cause for discharge of an employee than disloyalty to his employer,'" (*Fowler v. Varian Associates, Inc*. (1987) 196 Cal.App.3d 34, 43), and as William Hernandez himself testified, trust is "very important" in the case of "people [who] work in your home." In a case where untruthfulness about the misuse of funds is the grounds for termination, were courts to determine the existence of "good cause" based on a sliding scale of the property's value, they would be interfering with the employer's necessary and legitimate exercise of managerial discretion. This is especially true when the employee occupies a position as sensitive as a personal housekeeper, about whom homeowners should be

permitted substantial scope for determining whether they can remain comfortable and confident with that employee in their home in light of the employee's misconduct. Under the circumstances Rosa Hernandez's termination was not lacking in good cause.

As noted, *ante*, there is a dispute as to whether the Magowans actually terminated William Hernandez or whether he left on his own accord. Assuming for purposes of this appeal that he was terminated, the Magowans also had good cause for doing so. When William Hernandez went to see Deborah Magowan after she had terminated Rosa Hernandez, he initially pretended that he did not know about the termination. When his subsequent remarks revealed that, in fact, he knew both the fact and the reasons for her termination, he discounted lying and stealing as "no big deal." He also became obstreperous, accusing Deborah Magowan to Shirley Casabat, Peter Magowan's assistant, of being a liar and a horrible person. The combination of his prevarication, condoning the untrustworthy acts of his wife, and insubordination constitute the kind of conduct that can only be characterized as unacceptable for a household employee and subject to the homeowner's exercise of disciplinary discretion.

The Hernandezes argue that William Hernandez's behavior during his meeting with Deborah Magowan in her home office after Rosa Hernandez's dismissal cannot be considered as evidence of good cause to terminate him because it was not included in the Magowans' statement of undisputed facts. They note that the Magowans' initial motion for summary judgment asserted only that William Hernandez was an at-will employee who departed from their employment voluntarily, and that the Magowans did not raise the issue of good cause to terminate him or present Deborah Magowan's deposition testimony regarding his behavior in her home office until their reply to the Hernandezes' opposition to the motion for summary judgment.

However, the Hernandezes never objected to the inclusion of this new evidence in the Magowans' reply papers, either in writing[7] prior to the hearing on the motion, at the

[7] We appreciate that the Hernandezes had very little time to file a written objection prior to the hearing on the summary judgment motion scheduled for Tuesday, July 15, 2003. The Magowans completed their reply papers on Wednesday, July 9, 2003; they were

hearing itself, or to the court's subsequent order which stated that "even if Plaintiffs could prove that they were something other than at-will employees, Defendants possessed good cause to terminate their employment." Absent any such challenge, the trial court was entitled to consider this evidence as within the record before it. (Code Civ. Proc., § 437c, subd. (b)(5); *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426; cf., *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-316: trial court erred in considering, over opposing party's objection, moving party's supplemental declaration containing new facts submitted in reply to opposition to motion for summary judgment.)

Substantively, the Hernandezes argue that there is a triable issue of fact as to whether the Magowans had good cause to terminate them, relying on *Binder v. Aetna Life Ins. Co*., *supra*, 75 Cal.App.4th 832 (*Binder*).

In *Binder*, the plaintiff was a 30 year insurance company employee with an unblemished record who won a bonus of an excursion to a resort for meeting a specified sales goal. (*Binder*, *supra*, 75 Cal.App.4th at pp. 841, 842.) The bonus, which was undisputedly "earned compensation," was to be given in the form of a reimbursement of up to $300 for the cost of the resort. (*Id*. at pp. 841, 842.) The insurance company did not restrict employees to any particular type of resort or resort location. (*Id*. at p. 844.) Before availing himself of his earned bonus, the plaintiff was assigned to a new supervisor, with whom his relationship was immediately discordant. (*Id*. at pp. 842, 843.) The plaintiff then exercised his bonus by renting a beach condominium for a weekend. He did not get a receipt for the rental because the condominium owner did not want to report rental income for tax purposes, so he fabricated a detailed invoice on Rancho Bernardo Inn letterhead stationery and submitted this document to trigger payment of his bonus. (*Ibid*.) Soon afterwards he realized he had made a mistake and sought to withdraw the false invoice, but in the meantime the insurance company, unbeknownst to

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"received" (presumably by the Hernandezes' attorney; the record is a joint appendix, not a clerk's transcript) on Friday, July 11, and the hearing took place as scheduled.

the plaintiff, had begun an investigation of its validity. (*Id*. at p. 844.) The plaintiff's new supervisor terminated him for unethical conduct in violation of the insurance company's code of conduct, which justifies immediate termination for conduct that has caused a supervisor to question the employee's honesty and lose confidence in the employee's ability to perform his/her job. (*Id*. at p. 845.) The plaintiff sued for wrongful termination, and the trial court granted summary judgment for the insurance company. (*Id*. at p. 848.)

Binder reversed, concluding that the evidence did not eliminate all possibility of a reasonable inference that the insurance company did not act for fair and honest reasons, regulated by good faith. Rather, when the Rancho Bernardo invoice incident was viewed in light of the many circumstances sympathetic to the plaintiff and the lack of harm to the insurance company, it raised a reasonable inference that a termination based on the invoice incident was trivial, arbitrary, capricious, unrelated to business needs or pretextual. (*Binder*, *supra*, 75 Cal.App.4th at p. 856.)

There are fundamental factual differences between *Binder* and the instant case. Unlike Rosa Hernandez, the *Binder* plaintiff never attempted to appropriate his employer's property for unauthorized personal use. Rather, he was entitled to the $300 which he initially claimed via the mechanism of the fabricated invoice. Unlike Rosa Hernandez, who claimed the error on the grocery receipt was the store's error, the *Binder* plaintiff never dissembled that he was unaware of the invoice's invalidity or attempted to assign responsibility for the fabricated invoice to a third party. Unlike Rosa Hernandez, who did nothing about the misappropriation until Deborah Magowan questioned her about it, and unlike William Hernandez, who dismissed the severity of Rosa Hernandez's acts, the *Binder* plaintiff recognized independently that the fabricated invoice was a mistake, which he then sought to rectify, without being first challenged about it by his employer. Finally, the *Binder* plaintiff's sole transgression did not, as here, involve his employer's personal property or occur in an employer's home, which carries a traditional sense of sanctity. It was in the more neutral and arm's length setting of a business office and corporate transaction. Given these distinctions, *Binder* does not assist the Hernandezes.

Implied Covenant of Fair Dealing

The Hernandezes contend their termination breached the covenant of good faith and fair dealing in their implied employment agreement. The short answer is that they are precluded from making this contention because they never alleged that the Magowans breached the covenant of good faith. They simply alleged that the Magowans breached the implied-in-fact contract by terminating them without good cause.

In any case, their contention fails. The covenant of good faith and fair dealing, implied by law in every contract, requires that an employer act fairly and in good faith. (*Burton v. Security Pacific Nat. Bank* (1988) 197 Cal.App.3d 972, 979.) To be entitled to a trial for such a breach, the employee must set forth facts showing that the employer acted in bad faith and without probable cause. (*Ibid*.) Good cause to terminate is evidence of the employer's justification for its actions and inferentially of its good faith. (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 770.) "Even an honest, though mistaken, belief that the employer for legitimate business reasons had good cause for the discharge would negate bad faith. [Citations.]" (*Ibid*.) As we have discussed, the Magowans had good cause to terminate the Hernandezes. Thus, in the absence of a breach of the implied-in-fact contract, there can be no breach of its implied covenant of good faith and fair dealing.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Gemello, J.